UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC, Plaintiffs/Counterclaim Defendants, v. E.I. DU PONT DE NEMOURS AND CO. and PIONEER HI-BRED INTERNATIONAL, INC., Defendants/Counterclaim Plaintiffs.	Case No. 09-cv-0686 (ERW)

MEMORANDUM IN SUPPORT OF DFENDANTS' THIRD MOTION TO COMPEL

Notwithstanding its agreement to produce Roundup Ready and Roundup Ready 2 Yield licenses and related correspondence and strategic documents, and despite its failure to ever object to the relevance of such documents during the parties' meet and confer process that lasted more than a year and included face-to-face meetings, phone conferences, letters and e-mail communications, Monsanto unilaterally, and without notifying DuPont & Pioneer, decided to withhold such documents from production. After DuPont & Pioneer inquired about the absence of such documents in Monsanto's production, in mid-December Monsanto informed DuPont & Pioneer for the first time that it was withholding such documents because it is Monsanto's position that DuPont's & Pioneer's "switching strategy theory" is limited to allegations concerning coercion of independent seed companies ("ISCs"), and neither Syngenta nor Dow is an ISC. Monsanto's position completely ignores the fact that Syngenta and Dow are two of the most significant germplasm developers, and the allegations in DuPont's & Pioneer's Second Amended Answer and Counterclaims ("SAAC") relating to the role that switching germplasm developers to Roundup Ready 2 Yield played in effectuating Monsanto's anticompetitive switching strategy. Monsanto's unilateral and undisclosed decision to withhold responsive documents directly relevant to the allegations in the SAAC based on its views of relevance raises serious questions about what other undisclosed and unilateral relevance determinations Monsanto has made, calling into question the integrity of Monsanto's entire production.

Monsanto's new and unsupportable position also threatens to disable DuPont & Pioneer from gathering evidence concerning a central part of Monsanto's overall scheme to monopolize. Access to germplasm with some version of glyphosate-tolerance is essential for trait and germplasm developers to compete. That is why Monsanto has made removing Roundup Ready 1 soybean germplasm from the market a high priority; by doing so, it advances its goals of avoiding competition from generic versions of Roundup Ready 1 and installing its new, non-innovative Roundup Ready 2 Yield trait as a new required platform. Doing so threatens to extend its glyphosate-tolerance monopoly as well as its control over complementary traits that must be combined or stacked with glyphosate tolerance. Monsanto began this process by terminating its own Roundup Ready 1 breeding program, and focusing its breeding efforts exclusively on Roundup Ready 2 Yield. A second, crucial step was to switch other significant soybean germplasm developers from Roundup Ready 1 by inducing them to sign Roundup Ready 2 Yield licenses, thereby committing them to take their Roundup Ready 1germplasm off the market. Dow and Syngenta are two of the most important germplasm and trait developers, and Monsanto has succeeded in inducing them both to abandon Roundup Ready 1 just a few years before they would cease paying any royalties for it. The details of these agreements, their negotiation, and Monsanto's strategy concerning them are directly relevant to substantiating Monsanto's anticompetitive scheme.

Nor can Monsanto's late-adopted position be reconciled with DuPont's & Pioneer's pleadings, the parties' negotiations over discovery, the orders of this Court, or the rules of civil procedure. Accordingly, DuPont & Pioneer ask the Court to enter an order directing Monsanto to produce:

- All executed Roundup Ready 2 Yield licenses between Monsanto and Syngenta, including any affiliates and/or subsidiaries of Syngenta;
- All executed Roundup Ready 2 Yield licenses between Monsanto and Dow including any affiliates and/or subsidiaries of Dow;
- All documents concerning the negotiation of such Roundup Ready 2 Yield licenses; and
- All documents concerning Monsanto's strategy related to such Roundup Ready 2 Yield licenses and/or efforts to get Syngenta, Dow and/or their subsidiaries to switch from Roundup Ready to Roundup Ready 2 Yield.

In addition, DuPont & Pioneer request the Court to direct Monsanto to identify any other categories of documents as to which it has made a unilateral, undisclosed decision to withhold documents based on relevance determinations.

As noted above, the parties met and conferred concerning the documents at issue during the initial meet-and-confer process that spanned more than a year of negotiations. During those meet-and-confer sessions, Monsanto agreed to produce documents related to its licensing and other relationships with germplasm developers, including Dow and Syngenta. When it became apparent to DuPont & Pioneer that Monsanto had instead decided to selectively withhold documents concerning its relationships with Dow and Syngenta, DuPont & Pioneer reinitiated a meet and confer process focused on obtaining those documents. DuPont & Pioneer identified the apparent problem with Monsanto's production by letter of November 24, 2010. (Exh. A, 11/24/10 Letter from Mauser to Rosenthal.) In response, Monsanto stated its new relevance objection, and requested that DuPont & Pioneer "explain the relevance" of the requested documents "to claims in the Second Amended Counterclaims." (Exh. B, 11/29/10 Letter from Rosenthal to Mauser.) DuPont & Pioneer pointed out by letter that Monsanto had waived any relevance objections, and after a follow-up teleconference, provided a lengthy explanation of the relevance of documents concerning Monsanto's relationship with and treatment of germplasm developers, including Syngenta and Dow. (Exh. C, 12/03/10 Letter from Mauser to Rosenthal; Exh. D, 12/15/10 Letter from Mauser to Rosenthal.) Though DuPont & Pioneer requested the courtesy of a prompt response and subsequently reached out to Monsanto by email on January 3, 2011 and January 18, 2011, Monsanto has still not responded to these discrete requests. Accordingly, DuPont & Pioneer have exhausted their obligation to meet and confer, and hereby move the Court to order Monsanto to produce the requested documents.

ARGUMENT

Discovery under the federal rules is broad. *Liberty Mut. Fire Ins. Co. v. Centimark Corp.*, No. 08-Civ-230, 2009 U.S. Dist. LEXIS 19007, *2 (E.D. Mo. Mar. 4, 2009). Under Federal Rule of Civil Procedure Rule 26, "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1) (2010). "Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings." *Seger v. Tank Connection, LLC*, No. 08-Civ-075, 2010 WL 1665253 (D. Neb. Apr. 22, 2010). The Supreme Court has defined relevance for the purpose of discovery as "any matter that could bear on, or that reasonably could lead to other mater that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Under that standard, "[d]iscovery requests should be considered relevant … and should ordinarily be allowed, unless it is clear the information sought can have ***no possible bearing on the subject matter of the action***." *Seger*, 2010 WL 1665253, *5 (emphasis added). Discovery requests, such as those at issue in this motion, that seek information related to specific allegations set out in the pleadings fully satisfy the standard for relevance.

Monsanto, as the party resisting discovery, bears the burden of showing its relevance objections are valid and explaining why discovery should be limited. *Id.*; *see also Secure Energy, Inc. v. Coal Synthetics*, C.A. No. 4:08CV01719 JCH, 2010 U.S. Dist. LEXIS 1158, **2-3 (E.D. Mo. Jan. 7, 2010). "The party resisting discovery must show specifically how … each interrogatory or [request for production] is not relevant or how each question is overly broad, burdensome or oppressive." *Seger*, 2010 WL 1665253 at *5 (quoting *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-12 (N.D. Iowa 2000) (alteration in original)); *see also Liberty Mut. Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 19007 at *2-3. Bare assertions of irrelevance are ordinarily insufficient to bar production. *Id.*

In this instance, Monsanto has waived its relevance objection to the requests at issue. A party cannot maintain a relevance objection when it disclaims that objection in responding to discovery and selectively produces documents in response to the later-challenged request for production. *See Jones v. Forrest City Grocery Inc.*, No. 06-Civ-0944, 2007 WL 841676 (E.D. Ark. Mar. 16, 2007).

I. Documents Concerning Syngenta's and Dow's Licenses and Monsanto's Attempt to Switch Them to Roundup Ready 2 Yield Are Relevant to the Antitrust Claims.

There can be no serious question whether documents concerning Monsanto's relationship with Syngenta and Dow, two of the most important trait and germplasm developers, are directly relevant to the antitrust counterclaims DuPont & Pioneer have alleged against Monsanto. One of the primary reasons DuPont & Pioneer sought leave to amend their counterclaims was to "account for the full scope of conduct Monsanto has undertaken to maintain its ill-gotten monopoly power," including by "articulating the role of germplasm developers and Monsanto's treatment of them in its strategy to switch the industry to its new product" and "explain[ing] how Monsanto has coerced germplasm developers to switch to licensing germplasm with the Roundup Ready® 2 Yield trait and conditioned such licenses on their ending active Roundup Ready® breeding programs, the continuation of which are necessary for a viable generic version of the trait to emerge after patent expiration." (Memorandum in Support of Defendants' Motion for Leave to File Second Amended Answer and Counterclaims ("Br. to Amend") at 5, Dkt. # 170.) In the face of this clear statement of the purpose of filing the SAAC, Monsanto's current position that the allegations of the SAAC relate only to Monsanto's "forcing independent seed companies to switch from Roundup Ready 1 Soybeans to Roundup Ready 2 Yield Soybeans," (Exh. B at 1), is completely without basis.

The SAAC contains numerous allegations that Monsanto used license restrictions and other forms of coercion to induce germplasm developers, including Syngenta and Dow, to switch from Roundup Ready to Roundup Ready 2 Yield. To begin with, the SAAC specifically identifies Syngenta and Dow by name as relevant germplasm developers:

> Besides Monsanto, there are also only a few firms that invest significantly in the development of germplasm, the base genetic material for plants. **In soybeans,**

> **the principal developers of germplasm are** Midwest Oilseeds/Harry Stine, **Dairyland (a Dow subsidiary), Syngenta**, and Pioneer.

(SAAC ¶ 69 (emphasis added).) Moreover, the SAAC describes how Monsanto's treatment of germplasm developers like Syngenta and Dow fit into Monsanto's overall scheme to monopolize:

> **DuPont and Pioneer bring this action to arrest a new anticompetitive campaign by Monsanto designed to force** ISCs and **germplasm developers to switch from the Roundup Ready® platform trait to a new, non-innovative platform trait called Roundup Ready® 2 Yield** before the patent Monsanto asserts to cover Roundup Ready® expires, thereby allowing it to create a bridge from an expiring patent monopoly to a patent monopoly of longer duration, impede generic entry, and extend its monopoly power into developing markets involving combinations ("stacks") of input traits that confer multiple or more effective forms of herbicide tolerance or insect resistance or stacks of input and output traits that confer valuable end-use qualities.

(SAAC ¶ 2 (emphasis added); *see also id.*¶ 5.) DuPont & Pioneer therefore provided Monsanto with specific notice of the fact that its relationships with Syngenta, Dow, and Dow's subsidiary Dairyland would be put in issue.

The SAAC also describes Monsanto's coercive treatment of germplasm developers. The SAAC alleges specifically that "Monsanto told germplasm developers that, as a condition to obtaining a license to develop germplasm with the Roundup Ready® 2 Yield trait and to out-license such germplasm to ISCs, they would be required to stop breeding with Roundup Ready®," and that "in response to Monsanto's licensing terms, many … germplasm developers have converted, or are in the process of converting, from Roundup Ready® to Roundup Ready® 2 Yield, and are, or shortly will be, for practical purposes, committed to the switch." (SAAC ¶10.) The SAAC also describes Monsanto's anticompetitive goal with respect to germplasm developers: "By switching … germplasm developers to the Roundup Ready® 2

Yield trait, Monsanto seeks to remove the Roundup Ready® trait from the market prior to the time when competitors – including ISCs and Pioneer – will be able to market a generic product, thereby creating a bridge between its Roundup Ready® patent monopoly and its Roundup Ready® 2 Yield patent monopoly of longer duration." (SAAC ¶ 10.)

The SAAC contains numerous additional allegations concerning germplasm developers and Monsanto's treatment of them as it carried out its switching strategy. (*See, e.g.*, SAAC ¶ 12 ("Monsanto has already succeeded in effectively converting many ISCs and most germplasm developers to Roundup Ready® 2 Yield."); SAAC ¶ 75 ("As ISCs committed to switching to Roundup Ready® 2 Yield, germplasm developers, which license their germplasm to ISCs, had no choice but to incorporate Roundup Ready® 2 Yield into the germplasm they develop for out-licensing to ISCs."); *id.* ("Monsanto conditioned the right of germplasm developers to license germplasm containing the Roundup Ready® 2 Yield trait on the germplasm developers stopping their breeding programs for Roundup Ready®.").)

Documents concerning Monsanto's Roundup Ready 2 Yield soybean licenses with Syngenta and Dow are directly relevant to all of the above allegations. Indeed, Syngenta and Dow are two of the most important seed, trait, and germplasm companies in the industry. There is simply no basis for Monsanto to question the relevance of documents related to its Roundup Ready 2 Yield licensing relationship with them. *Jones*, 2007 WL 841676 at *1 ("[S]howing that a matter is not relevant during the early stages of a lawsuit is a difficult task because almost everything is relevant in the discovery process."); *cf. id.* ("Discovery is ***not limited to issues raised by the pleadings***, because it is designed to help define and clarify these issues") (emphasis added).

In any event, the Court has already effectively ordered that such documents be produced. In responding to Monsanto's overly narrow interpretation of the Court's stay order, which Monsanto previously used as shield against producing documents related to certain components of DuPont's & Pioneer's overarching switching strategy monopolization and attempted monopolization claims, the Court expressly permitted discovery on "the full scope of the 'switching strategy' allegations pled by Defendants," which include, without limitation, the kinds of licenses and related documents at issue in this motion. (Memorandum and Order, dated July 30, 2010, at 19-20.) Monsanto's late-announced relevance objection is simply another attempt to avoid responding to the merits of DuPont's & Pioneer's antitrust allegations.

II. The Production of Documents Concerning Dow & Syngenta Licenses and Monsanto's Attempt to Switch Them to Roundup Ready 2 Yield Should Not Be Burdensome.

Nor can Monsanto credibly object to producing these documents on the basis of overbreadth or burden. DuPont & Pioneer here request licenses and related negotiation and strategic documents concerning Monsanto's relationship with only two companies. The requests are also limited by their focus on the switch from Roundup Ready to Roundup Ready 2 Yield. Monsanto's negotiations with Dow and Syngenta concerning Roundup Ready 2 Yield licenses all took place between 2007 and 2010. In addition, Monsanto has already collected the relevant documents under the parties' agreement concerning the parameters of discovery. The parties have collected documents from 50 agreed-to custodians. The requested documents should be within the files of those custodians. These requests do not require Monsanto to search additional custodians. As Monsanto's own attorney pointed out to the court during the argument of a separate motion to compel:

> And **the burden here I don't think is that tremendous**, because under the protocol the parties agreed to, we are going to start with 50 custodians on each side. We are not asking them to go back and search their whole company. **We're**

> **asking them to go back and search the 50 custodians that they have already collected from**.

(Transcript of Proceedings (November 23, 2010) at 50 (emphasis added).)

Accordingly, there is no substantive or practical basis for Monsanto's failure to produce the requested documents, and an order compelling production is warranted on the merits. *See Seger*, 2010 WL 1665253 at *5 ("The party resisting discovery has the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome."). Monsanto has articulated no burden to responding to these focused requests, and it is hard to imagine what burden there could be to avoid responding to requests so central to the antitrust claims in this case.

III. Monsanto Waived Its Relevance Objection to Producing Documents Concerning Syngenta and Dow Licenses and Monsanto's Attempt to Switch Them to Roundup Ready 2 Yield.

Early in discovery, DuPont & Pioneer issued document requests directed to obtaining information concerning Monsanto's relationships with germplasm developers, including Dow and Syngenta. DuPont & Pioneer issued specific requests relating to Monsanto's licenses with seed companies and germplasm developers. (*See* Exh. E, Monsanto's Responses and Objections to Defendants' Second Set of Requests for Production of Documents ("Responses"), Requests No. 4 and No.5.)

Monsanto did not object to producing documents concerning its relationships with germplasm developers such as Syngenta and Dow in responding to these requests. Instead, in response to Request No. 4, Monsanto expressly agreed to produce examples of all standard licenses and stated that it would produce all "executed, non-standard Roundup Ready® and Roundup Ready® 2 Yield soybean license agreements." (Responses, Request No. 4.) In response to Request No. 5, which is specifically directed to germplasm licenses, Monsanto similarly agreed to produce examples of all standard licenses and also to produce all "executed, non-standard Roundup Ready® and Roundup Ready® 2 Yield soybean germplasm license agreements." (Responses, Request No. 5.). These responses encompass the Dow and Syngenta Roundup Ready 2 Yield license agreements, which are not standard licenses, and which Monsanto has now refused to produce despite its prior commitment to do so, and Pioneer's reliance upon that commitment.[1]

In addition, Monsanto expressly agreed to produce documents concerning "'the process and timing for switching or transitioning' Monsanto's 'licensees from Roundup Ready® to Roundup Ready® 2 Yield in soybeans"; "'incentives promised and/or offered for switching or transitioning from Roundup Ready® to Roundup Ready® 2 Yield in soybeans"; and "'preferential pricing' Monsanto has offered to companies 'that agreed to switch from Roundup Ready® to Roundup Ready® 2 Yield in soybeans.'" (Responses, Request No. 4; *see also* No. 5 (same for soybean germplasm).) Thus, Monsanto agreed to produce precisely the types of documents DuPont & Pioneer seek in this motion without excluding from that commitment materials relating to Dow or Syngenta.

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[1] Monsanto has represented that it has produced "all executed, non-standard Roundup Ready and Roundup Ready 2 Yield soybean and soybean germplasm license agreements from 2001 to 2010, with the sole exception of Monsanto's license agreements with Syngenta, which Monsanto has objected to producing." (1/13/2011 E-mail from Rosenthal to Mauser.) While Monsanto has produced Dow's current Roundup Ready 2 Yield license and a draft of Dow's original Roundup Ready 2 Yield license agreement, DuPont & Pioneer have been unable to locate in Monsanto's production a final, executed version of the original license. We therefore request the Court to direct Monsanto to identify where the executed version of Dow's original Roundup Ready 2 Yield license is located in its production and, if Monsanto is unable to identify where, to produce it. In addition, if Monsanto's representation that there are no other non-standard Roundup Ready and Roundup Ready 2 Yield soybean and soybean germplasm license agreements beyond Syngenta's and those that it has produced turns out to be incorrect, DuPont & Pioneer are also entitled to any other Roundup Ready and Roundup Ready 2 Yield soybean and soybean germplasm license agreements.

Monsanto informed DuPont & Pioneer during the meet-and-confer process that notwithstanding any boilerplate objections contained in its responses, Monsanto would not stand on any objection to those requests as related to the categories of documents it agreed to produce in its responses. As a result, Monsanto plainly waived its relevance objections, and cannot assert them now. *Jones*, 2007 WL 841676 at *1 ("A party cannot object to an interrogatory or request for production, and, at the same time, answer the request for production in the same response. If a party does this, the objection is waived.")

Monsanto plainly anticipated producing documents related to germplasm developers such as Dow and Syngenta. Monsanto agreed to search its document collection using the following search terms:

- (Syngenta /p settle!) /50 ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or 40-3-2 or OGAT or "Optimum GAT" or "O-GAT")
- germplasm /40 (licens! or breed!) /40 (Roundup Ready 2 Yield or RR2! or Roundup or RR or 40*3*2)[2]
- (destroy! or destruct!) /p ("biological material" or seed or breed! or germplasm or variet!) /25 ("Roundup Ready" or RR or 40*3*2)
- (out-license or outlicense) /20 germplasm
- "market share" and ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or "herbicide toleran!" or "insect resist!" or germplasm)
- Generic /p (soy or Roundup Ready or RR!) share /5 (corn or soy or trait! or germplasm)

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[2] DuPont & Pioneer note that the list of "Final Monsanto Search Terms" Monsanto provided to DuPont & Pioneer on October 19, 2010 shows the first two search terms on this list as a single, syntactically incorrect search term: "(Syngenta /p settle!) /50 ("Roundup Ready" or RR or "Roundup Ready 2 Yield" or RR2! or 40-3-2 or OGAT or "Optimum GAT" or "O-GAT")germplasm /40 (licens! or breed!) /40 (Roundup Ready 2 Yield or RR2! or Roundup or RR or 40*3*2)." Monsanto agreed to run these search terms separately, and DuPont & Pioneer have requested that Monsanto do so, and produce any resulting documents as part of supplementing its production. (*See* Exh. D at 4 n.1.) Monsanto has not responded to this request. If Monsanto refuses to correct this error, it may be necessary for DuPont & Pioneer to raise this issue with the Court at a later time.

- Compet! /20 (trait! or seed! or grain! or germplasm or RR or RR1 or "Roundup Ready" or patent!)
- "Corn States" /5 germplasm /20 (RR or RR1 or "Roundup Ready" or RR2 or "Roundup Ready 2 Yield")
- ("HCS" or "Holdens" or "Holden's") /10 germplasm /20 (soy! or Roundup Ready" or RR or RR2!)

These search terms and others demonstrate that Monsanto understood the SAAC incorporated allegations that would require production of documents concerning germplasm developers and that Monsanto waived any relevance objection to such documents.

The allegations and search terms reproduced above make perfectly clear what DuPont & Pioneer argued in seeking leave to amend – that "Monsanto's treatment of germplasm developers is an important component – one among many – of Monsanto's switching strategy." (Br. to Amend at 6.) That being the case, DuPont & Pioneer are entitled to document discovery concerning these allegations. *See* Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 34. Monsanto's refusal to produce such documents is therefore entirely improper.[3]

CONCLUSION

For the foregoing reasons, DuPont & Pioneer respectfully request that the Court Order Monsanto to produce the documents addressed in this motion, and to identify any additional categories of documents that Monsanto has withheld based on its unilateral and undisclosed relevance determinations.

[3] Monsanto did not challenge the addition of the allegations concerning germplasm developers to the Counterclaims when DuPont & Pioneer sought leave to amend and did not seek dismissal of claims based on those allegations when it moved to dismiss certain other antitrust allegations.

Dated: January 25, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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